No. 11,429

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK KESSLER and IRVING J. LEVINE, doing business under an assumed name, business and style, as K & L DISTRIBUTORS,
Appellants,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator,
Appellee.

No. 11,429

Petition for Rehearing

EMORY & HOWE,
Attorneys for Appellant
977 Dexter Horton Bldg.
Seattle 4, Washington

DeWOLFE EMORY
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Come now the Appellants above named and respectfully petition this Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of this petition represent to the Court as follows:

We reserve our argued position as to each of the points of appeal, but shall in this petition address ourselves solely to that feature of the decision wherein we believe the Court may be convinced its result is based upon the application of incorrect legal principles. Without further comment, therefore, we specifically reserve the points of:

(1) claimed authority of district enforcement attorney to institute the litigation;

(2) whether the sales in question are not in fact and in law, export sales;

(3) whether the Administrator is estopped, or the cause should be withdrawn, because of the conduct of Administration personnel in dealing with the Appellants.

These points are determined adversely to the Appellants in the portions of the printed opinion designated as sections 1 to 3 respectively.

The foregoing features being reserved, and not commented upon herein, this petition is devoted to convincing this Court that it has erred in its determination of the fourth major question put to it upon appeal. At pages four and five of the printed opinion, the court concludes that the one-year limitation upon this cause of action was satisfied because, "The question as to when the parties intended title to pass presented an issue of fact to be resolved by the trial court on consideration of all the evidence bearing on the subject."

This statement, upon which the result depends, is demonstrably erroneous. It is especially so when further quotation discloses that the evidence considered is that pertaining to the times of physical transfer of possession of the bills of lading.

As is noted in the paragraph of the printed opinion which commences at the bottom of page four thereof, there are two sections of the Uniform Sales Act which were urged upon the Court as applicable. Appellee claimed that section 18 is the pertinent section. That section reads as follows:

> "(1) Where there is a contract to sell *specific or ascertained* goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case." (emphasis supplied)

On the other hand, Appellants claim that the applicable section in this case is section 19, Rule 4:

> "(1) Where there is a contract to sell *unascertained* or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer . . ." (emphasis supplied)

This Court has mistakenly accepted section 18 as controlling; has quoted from it to the effect that intention con-

trols and that certain factors evidence intention; and has applied it to this case in affirming the trial court's holding that none of the alleged violations is barred by the one-year limitation.

The contrary meanings of "unascertained" goods and of "specific or ascertained" goods, pose a problem of definition in this case which can only result in the determination that these goods were "unascertained" and that the principles of law urged by the Appellants are the ones to be applied.

There is no question from the record but that the Tom Burns whiskey sold to Shyman was a part of a larger stock. It was sold under its brand name and in certain sizes of containers as a description. Prior to the shipment of the merchandise, could Shyman have gone to the warehouse of the rectifier and said, "This lot of whiskey is mine; that lot is not"? He could not have done so because his contract was not for specific, ascertained goods. Until segregated and shipped, the whiskey being sold him was not identifiable, was not specific, and section 18 of the Sales Act does not apply.

Of the word "ascertain," the *New Century Dictionary* (Appleton-Century, 1927), page 76, says:

"To make certain, clear, or definitely known . . ."

The pertinent definitions by the *Webster Twentieth Century Dictionary* (Publishers' Guild, 1941), at page 104, are:

> "To make certain; to define or reduce to precision, by removing obscurity or ambiguity; to determine; . . . To fix, to establish with certainty; to render invariable and not subject to will."

Ballentine's Law Dictionary (Lawyers' Co-op., 1930), at page 110, says:

"To make certain; to fix; to establish with certainty . . ."

That this is the meaning to be applied to the term "ascertained goods" as applied to the field of sales law, is made clear by the phraseology employed by Professor Vold in his work, *Vold on Sales* (sec. 73-75, p. 192), of *"certain, particular, identified goods."*

Publicker Commercial Alcohol Co. v. Harger, (Conn. 1943) 129 Conn. 655, 31 Atl. 2d 27, illustrates the application of the terms in a case involving whether certain alcohol being sold constituted ascertained or unascertained goods. At page 28 of the Atlantic Reporter publication, the court says:

> "The situation does not fall within rule 4 . . . (of section 19) . . . of our Sales Act, for the reason that that rule applies only as regards a contract to sell unascertained or future goods by description, whereas the sale here in question was of goods definitely identified by the serial numbers of the drums."

Certainly these goods were unascertained goods being sold by description, and it is certain to us that the rules of law set out at pages 45 to 49 of the opening brief of Appellants are the ones which must control in determining when

the alleged violations of sale and delivery took place. In an appropriate disposition of the limitation contention made in this case, the first esential is the determination of the dates of alleged violation.

This Court has erred in determining the date of alleged violations upon this mistaken basis:

(1) Section 18 of the Uniform Sales Act determines the transfer of title to goods upon the intention of the parties.

(2) The intention of the parties is evidenced by the physical transfer of possession of the bills of lading to Shyman.

(3) The earliest delivery of a bill of lading to Shyman was April 29, 1943, and therefore the institution of this action was within a year of all such alleged violations.

But that disposition of the case perpetuates the error of the trial court in ignoring that these goods were *unascertained*. Section 18 of the Uniform Sales Act is inapplicable and has no proper place in the disposition of this cause except to be rejected. Appropriate determination of the question of applicability of the one-year limitation, must start with a correct basis of recognizing the nature of the goods. We repeat and emphasize that these goods were *unascertained;* they were *not specific;* they were *not identified.*

Instead of turning to Section 18, we must therefore turn to Rule 4 of Section 19 of the Uniform Sales Act to find when

the title to these goods passed to the buyer. We discover that it does so when the goods are appropriated to the contract, and that (sub-par. (2)) appropriation occurs upon delivery to the carrier. The court will find no reference to physical transfer of possession of the bill of lading; delivery of the bill of lading has no bearing upon the passage of title; the Court errs in saying: "title did not pass from K & L to Shyman until the bills of lading were endorsed and delivered to Shyman in Seattle." The law is otherwise; the law is that title passed when the goods were delivered to the carrier. We respectfully and confidently refer the court to the authorities cited at pages 46 to 48 of the opening brief of the Appellants herein. Those authorities clearly spell out the following points of law:

(1) in an "f.o.b. point of shipment" sale, title passes upon delivery of the goods to the carrier.

(2) delivery to the carrier is delivery to the buyer.

(3) these rules apply when the bill of lading is to the seller's order, blank endorsed.

The opinion of this Court has not cited, distinguished or rejected those authorities. Instead the court merely says: "The question as to when the parties intended title to pass presented an issue of fact to be resolved by the trial court. . . . We are not able to say that the finding is clearly erroneous." This result, grounded upon the acceptance of Section 18 of the Uniform Sales Act, is clearly erroneous because that sec-

tion does not apply. This was no question of fact to be determined by when bills of lading were physically handed over; the Uniform Sales Act tells us that title to these goods passed when they were delivered to the carrier, and uncontradicted case authority tells us that such delivery is delivery to the buyer.

Such passage of title and such delivery are what constitute the alleged violations in this case, and this Court erred in failing to apply the one-year limitation against the dates of "sale" and "delivery" which occurred upon the delivery of the merchandise to the carrier. Assuming (for the purposes of this petition) that the Court's opinion was correct in all respects save this one, the judgment should have been affirmed only in the amount of $29,090, rather than $42,861 (K & L Exhibit 26, R. 133). The Court clearly erred in failing to apply the principles here urged.

For the foregoing reasons, this petition for rehearing should be granted.

EMORY & HOWE
Attorneys for Appellants.

DeWOLFE EMORY
Of Counsel

CERTIFICATE OF COUNSEL PURSUANT TO COURT RULE 24

STATE OF WASHINGTON
COUNTY OF KING

ss.

DE WOLFE EMORY, being first duly sworn, on oath certifies and says:

That he is one of the attorneys for Appellants in this cause; that he is an attorney admitted to practice before the District Court of the United States for the Western District of Washington, Northern Division, and before this Court; that he makes this certificate in compliance with Rule 24 of the rules of this Court; that in his judgment the within and foregoing petition for rehearing is well founded; and that the same is not interposed for delay.

Subscribed and sworn to before me at Seattle, Washington, this 8th day of September, 1947.

Notary Public in and for the State of Washington, residing at Seattle.